

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DAVID C. HOBSON and D.C.
HOBSON, DDS, MS, a
professional corporation,

NO. CIV. S-02-0886 WBS PAN

Plaintiffs,

v.

MEMORANDUM AND ORDER
RE: ATTORNEY'S FEES

ORTHODONTIC CENTERS OF
AMERICA, INC. and ORTHODONTIC
CENTERS OF CALIFORNIA, INC.,

Defendants.

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Currently before the court is plaintiffs David C. Hobson and D.C. Hobson, DDS, MS, a professional corporation (collectively "Hobson") motion for attorney's fees after appeal.

I. Factual and Procedural Background

Hobson brought this action against defendants Orthodontic Centers of America, Inc. and Orthodontic Centers of California, Inc. (collectively "OCA") for (1) declaratory relief, (2) breach of contract, (3) breach of fiduciary duty, (4) unfair business practices, and (5) money had and received. OCA

1 counterclaimed for (1) specific performance, (2) breach of
2 contract, (3) conversion, (4) promissory estoppel, (5) unjust
3 enrichment, (6) quantum meruit, and (7) money had and received.
4 On summary judgment, this court dismissed OCA's promissory
5 estoppel claim. The rest of the parties' claims were tried, with
6 the exception of Hobson's claim for money had and received, which
7 was dismissed at trial.

8 After a fourteen-day trial, the jury awarded Hobson
9 \$82,594 on his breach of contract claim and rejected OCA's
10 contract and conversion claims. (Sept. 14, 2004 Am. J.).
11 Hobson's fiduciary duty claim was also rejected. (Id.)
12 Thereafter, this court held a hearing on OCA's remaining claims
13 and awarded OCA \$194,500 plus interest for rent paid after Hobson
14 terminated his contract with OCA. (Id.) The court gave Hobson
15 the choice of either returning the furniture, fixtures, and
16 equipment Hobson had retained in his offices or paying OCA
17 \$106,828 plus interest in restitution. (Id.)

18 On November 29, 2004, this court held that Hobson was
19 the "prevailing party" under the parties' Business Services
20 Agreement ("the Agreement") for purposes of attorney's fees and
21 costs and awarded him attorney's fees in the amount of
22 \$485,022.00. OCA appealed, and on January 29, 2007, the Ninth
23 Circuit affirmed this court's judgment. Hobson v. Orthodontic
24 Ctrs. of Am. Inc., No. 05-15105, 2007 U.S. App. LEXIS 2202 (9th
25 Cir. Jan. 29, 2007). On February 22, 2007, the Ninth Circuit
26 denied OCA's petition for a rehearing. (See Court of Appeals No.
27 05-15105 Docket.)

28 Hobson filed a motion to transfer consideration of

1 attorney's fees on appeal to this court on March 9, 2007. (Id.)
2 On March 13, 2007, Hobson filed this motion for attorney's fees
3 in the amount of \$54,387.50. (Id.) The Ninth Circuit granted
4 Hobson's motion to transfer the attorney's fees motion to this
5 court on March 30, 2007. (Id.)

6 II. Discussion

7 A. Timeliness

8 OCA objects to this court's consideration of Hobson's
9 motion for attorney's fees and costs on the ground that it was
10 not filed within the 14 day period set forth in Ninth Circuit
11 Rule 39-1.6, and that Hobson's excuses do not constitute good
12 cause. OCA argues that the Ninth Circuit's transfer of Hobson's
13 motion for attorney's fees and costs to this court did not
14 "sanitize" Hobson's late-filing. OCA cites Cummings v. Connell
15 for the proposition that "Rule 39-1.8 authorizes [the Ninth
16 Circuit] to transfer a timely-filed fees-on-appeal request to the
17 district court for consideration." 402 F.3d 936, 947-948 (9th
18 Cir. 2005). However, in Cummings, the Ninth Circuit vacated a
19 district court's order awarding attorney's fees because the party
20 seeking attorney's fees never filed their request with the Ninth
21 Circuit. Accordingly, the Ninth Circuit never transferred the
22 request to the district court. Cummings does not apply here,
23 however, because in this case the Ninth Circuit did transfer the
24 attorney's fees motion to this court.

25 Ninth Circuit Rule 39-1.8, which governs the request
26 for transfer of attorney fee's motions, reads:

27 Any party who is or may be eligible for attorneys fees on
28 appeal to this Court may, within the time permitted in
Circuit Rule 39-1.6, file a motion to transfer consideration

1 of attorneys fees on appeal to the district court or
2 administrative agency from which the appeal was taken.

3 Ninth Cir. Rule 39-1.8. Because OCA filed a timely petition for
4 rehearing, Rule 39-1.6 requires that a request for attorney's
5 fees be filed "within 14 days after the court's disposition of
6 such petition or filing." Ninth Cir. Rule 39-1.6.

7 Here, Hobson sent his request for transfer one day
8 prior to the 14-day deadline. However, Hobson's request was not
9 filed by the clerk until one day after the 14-day period elapsed.
10 Federal Rule of Appellate Procedure 25(a) (2) (A) notes that
11 "filing is not timely unless the clerk receives the papers within
12 the time fixed for filing." Fed. R. App. P. 25(a) (2) (A).
13 However, Fed. R. App. P. 26(b) allows the extension of a time
14 period for good cause. Fed. R. App. P. 26(b). Although a court
15 may not extend the time to file certain documents, such as notice
16 of appeal, a motion for attorney's fees and a motion for transfer
17 do not have that restriction. Id. "The exercise of that
18 discretion is especially appropriate [where] there is no
19 suggestion of prejudice." Hutchinson v. Pfeil, 211 F.3d 515, 518
20 (10th Cir. 2000) (citing Hammett v. Seastrunk, 365 F.2d 232, 233
n.2 (4th Cir. 1966)).

21 Hobson's attorney was on vacation when the court denied
22 OCA's petition for rehearing, and did not receive notice of the
23 Ninth Circuit's action until March 5, 2007. This court finds
24 that Hobson proceeded diligently upon learning that OCA's
25 petition for a rehearing was denied and fails to see the
26 prejudice caused to OCA by the one-day delay. Therefore, this
27 court excuses any tardiness on the part of Hobson.
28

1 OCA even if the late-filing of Hobson's motion to
2 transfer is excused, there was no excuse for Hobson's failure to
3 file the motion for attorney's fees itself within the 14 days
4 allowed by Ninth Cir. Rule 39-1.6. That motion was filed on
5 March 13, 2007, and only out of an abundance of caution. The
6 expiration of the 14-day period was March 8, 2007. Ninth Circuit
7 Rule 39-1.8 only requires that a motion to transfer consideration
8 of attorney's fees be filed within the 14-day period. When a
9 motion to transfer is filed, it is not clear that the attorney's
10 fees motion itself has to be filed at all with the Ninth Circuit.
11 Cummings held only that the absence of the transfer meant that
12 the district court was not authorized to rule on the request for
13 appellate attorney's fees. 402 F.3d at 948.

14 Should Circuit Rule 39-1 also require that Hobson
15 timely file a motion for attorney's fees in the Ninth Circuit,
16 this court finds good cause for Hobson's delay under Federal Rule
17 of Appellate Procedure 26(b) because no prejudice resulted to
18 OCA. OCA was able to fully brief and present oral argument of
19 the matter on the merits. Indeed, at oral argument, OCA spent
20 little time discussing its substantive objections Hobson's
21 request for appellate attorney's fees.

22 B. Applicable Law

23 Section 8.10 of the Agreement between the parties
24 provides that:

25 [i]f a legal action is commenced by either party to
26 enforce or defend its rights under this Agreement, the
27 prevailing party in such action shall be entitled to
recover its costs and reasonable attorneys' fees in
addition to any other relief granted.

28 When sitting in a diversity case, a federal court applies the law

1 of the forum state regarding an award of attorney's fees. See,
2 e.g., Kona Enter., Inc. v. Estate of Bernice Pauahi Bishop, 229
3 F.3d 877, 883 (9th Cir. 2000). Under California law,
4 "[California Civil Code §] 1717 is the applicable statute when
5 determining whether and how attorney's fees should be awarded
6 under a contract." Sears v. Baccaglio, 60 Cal. App. 4th 1136,
7 1157 (1998).

8 Under § 1717, the prevailing party is "the party who
9 recover[s] the greater relief in the action on the contract."
10 Cal. Civ. Code § 1717(b)(1); Sears, 60 Cal. App. 4th at 1143.
11 The Ninth Circuit has affirmed this court's determination,
12 pursuant to § 1717, that Hobson is the prevailing party. Hobson,
13 2007 U.S. App. LEXIS 2202 at *4. "A contract for a reasonable
14 attorney's fee in enforcing its provisions embraces an allowance
15 for legal services rendered upon appeal as well as during the
16 trial." Cirimele v. Shinazy, 134 Cal. App. 2d 50, 52 (1955)
17 (citing Hahn v. Hahn, 123 Cal. App.2d 97, 103 (1954)).

18 C. Lodestar Calculation

19 Under California law, "the fee setting inquiry . . .
20 ordinarily begins with the 'lodestar,' i.e., the number of hours
21 reasonably expended multiplied by the reasonable hourly rate."
22 PLCM Group, Inc. v. Drexler, 22 Cal. 4th 1084, 1095 (2000).

23 1. Reasonable Hourly Rates

24 The reasonable hourly rate is determined with reference
25 to that prevailing in the community for similar work. Id.
26 (citation omitted). One attorney, Matthew Bradford, and one law
27 clerk, Paul Dolberg, worked on the appeal of this case for
28 Hobson. Matthew Bradford billed Hobson at the rate of **\$235** per

1 hour, and Paul Dolberg billed at **\$125** per hour. (See Bradford's
2 Decl. in Supp. of Pls.' Mot. for Atty's Fees After Appeal ¶¶ 11-
3 12; Malm's Decl. in Supp. of Pls.' Mot. for Atty's Fees ¶¶ 1-4;
4 Rios' Decl. in Supp. of Pls.' Mot. for Atty's Fees ¶¶ 1-4.) OCA
5 does not contest the hourly rates claimed by Hobson's attorney,
6 and the court finds those rates to be reasonable.

7 2. Reasonable Hours Expended

8 Under California law, a court determining the number of
9 hours reasonably expended on a case "must carefully review
10 attorney documentation of hours expended; 'padding' in the form
11 of inefficient or duplicative efforts is not subject to
12 compensation." Ketchum v. Moses, 24 Cal. 4th 1122, 1132 (2001)
13 (quoting Serrano v. Priest, 20 Cal. 3d 25, 48 (1977)).

14 Hobson's attorney has requested compensation for 241.5
15 hours of work.¹ OCA objects to several entries on the ground
16 that under the Federal Rules of Appellate Procedure, Hobson may
17 only be reimbursed for fees incurred in the court of appeals.
18 OCA's objections can be classified into two categories: (1) work
19 concerning whether this court's judgment would be stayed during
20 the pendency of the appeal² and (2) work concerning OCA's
21 bankruptcy and the effect of that bankruptcy on the execution of
22 this court's judgment.³

23
24 ¹ Matthew Bradford worked 220 hours and Paul Dolberg
25 worked 21.5 hours. (See Pls.' Am. Mot. in Supp. of an Award of
Atty's Fees Detailed Chart of Att's Fees at 6.)

26 ² Detailed Chart of Attorney's Fees by Plaintiffs Nos. 7,
27 8, 9, 12, 13, 15, 16, 20, 21, 22, 23, 24, 26, and 27.

28 ³ Detailed Chart of Attorney's Fees by Plaintiffs Nos.
51, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, and 101.

OCA's cited authority does not support the proposition that only fees incurred in the court of appeals may be reimbursed in this case. In Stevedoring Servs. of Am. v. Price, the Ninth Circuit denied a request for attorney's fees pursuant to Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. § 928(a), because the "Federal Rules of Appellate Procedure solely govern proceedings in the courts of appeals and therefore provide no authority for us to award costs for proceedings in the Supreme Court." 432 F.3d 1112, 1114 n.1 (9th Cir. 2006). Because § 928(c) states that a court "'may approve an attorney's fee for the work done before it by the attorney for the claimant,'" the Ninth Circuit disallowed an award for work done before the Supreme Court. Id. at 1113-14 (citing 33 U.S.C. § 928(c)) (emphasis in original). However, when sitting in diversity, a federal court applies the law of the forum state regarding an award of attorney's fees. Kona Enter., 229 F.3d at 883. In California, contract attorney's fees clauses allow for reimbursement for services rendered on appeal. Cirimele, 134 Cal. App. 2d at 52 (citing Hahn, 123 Cal. App. 2d at 103).

Nevertheless, the court must "carefully review" and ensure that all claimed work was "rendered upon appeal." Ketchum, 24 Cal. 4th at 1132 (citing Serrano, 20 Cal. 3d at 48); Cirimele, 134 Cal. App. 2d at 52 (citing Hahn, 123 Cal. App. 2d at 103). Whether this court's judgment was to be stayed during the pendency of the appeal clearly relates to the appellate proceedings in this case. OCA's appeal necessitated work by Hobson's attorney on securing a supersedeas bond from OCA during the pendency of that appeal. (See Detailed Chart of Attorney's

1 Fees by Plaintiffs Nos. 7, 8, 9, 12, 13, 15, 16, 20, 21, 22, 23,
2 24, 26, and 27.) Hobson secured a bond \$270,360 in this court on
3 January 27, 2005. (January 27, 2005 Order 4.) The court will
4 therefore allow reimbursement for these fee entries.

5 OCA also objects to billing entries related to OCA's
6 bankruptcy. During the pendency of the appeal, OCA filed a
7 complaint in the Superior Court of California for the County of
8 San Joaquin, alleging breach of promissory notes, money had and
9 received, and quantum merit. OCA removed that case to this
10 court, pursuant to 28 U.S.C. §§ 1441, 1452, and Fed. R. Bankr. P.
11 9027, because it related to a bankruptcy proceeding in the United
12 States Bankruptcy Court for the Eastern District of Louisiana.
13 On January 9, 2007, this court denied OCA's motion to transfer to
14 the Louisiana Bankruptcy Court. Orthodontic Ctrs. of Cal., Inc.
15 v. Hobson, No. 06-1805, 2007 U.S. Dist. LEXIS 5279 (E.D. Cal.
16 Jan. 9, 2007).

17 Although the bankruptcy matter related to OCA's appeal
18 of this court's judgment, the services of Hobson's attorney in
19 connection with the bankruptcy matter cannot be deemed to be
20 rendered on the appeal. The bankruptcy case remains on-going.
21 In response to OCA's objection, Hobson affirms that none of the
22 requested fees relate the bankruptcy matter or matter decided by
23 this court in January. Instead, that work related to whether the
24 appeal could proceed given OCA's bankruptcy and some filings with
25 the appellate court showing that the bankruptcy automatic stay
26 had been lifted. (Bradford Reply Decl. ¶ 12.) Moreover, these
27 fees were mostly incurred between March and August, 2006, lending
28 credibility to Hobson's attorney's declaration that none of the

1 fees were incurred in connection with the bankruptcy matter in
2 Louisiana or the matter removed and still pending in this court.
3 (See Detailed Chart of Attorney's Fees by Plaintiffs Nos. 51, 76,
4 77, 78, 79, 80, 81, 82, 83, 84, 85, and 101.) Accordingly,
5 reimbursement for these fee entries will be allowed.

6 Given that the court has reviewed the fee bills
7 submitted by Hobson and found that Hobson's attorney expended a
8 reasonable amount of hours on the litigation underlying this
9 motion, and that no apportionment is necessary, the court
10 determines that Hobson's request for compensation of 241.5 hours
11 of work is reasonable.

12 iii. Adjustments To The Lodestar Figure

13 After performing the lodestar calculations, the court
14 must "consider whether the total fee award so calculated under
15 all of the circumstances is more than a reasonable amount and, if
16 so, [must] reduce the . . . award so that it is a reasonable
17 figure." PLCM Group, 22 Cal. 4th at 1095-96. To make this
18 determination, the court considers "a number of factors,
19 including the nature of the litigation, its difficulty, the
20 amount involved, the skill required in its handling, the skill
21 employed, the attention given, the success or failure, and other
22 circumstances of the case." Id. at 1096 (quoting Melnyk v.
23 Robledo, 64 Cal. App. 3d 618, 623-624 (1976)).

24 Multiplying the reasonable hours expended by Hobson's
25 attorney by the hourly rates approved by the court, the lodestar
26 figure amounts to \$54,387.50. The table below illustrates this
27 calculation:

28 ///

<u>Attorney</u>	<u>Time Billed</u>	<u>Hourly Rate</u>	<u>Total</u>
Matthew Bradford	220 hours	x \$235 =	\$ 51,700.00
Paul Dolberg	21.5 hours	x \$125 =	\$ 2,687.50
		Total	= \$ 54,387.50

In preparing their case, Hobson's attorneys had to sort through voluminous documents. In this court's previous attorney's fees order, the court noted that the issues at the trial were sophisticated and could only be conveyed to the jury by skilled attorneys. (November 29, 2004 Order 10.) The court held, "Given the nature and difficulty of this litigation, the number of hours reasonably expended by Hobson's attorneys, the skill demonstrated by those attorneys, and Hobson's overall victory on the contract claims, the court finds that the lodestar figure need not be adjusted." (Id.) The court did not observe the work of Hobson's attorney on appeal. However, the court has no reason to doubt--nor has OCA argued--that the level of skill employed was materially different such that the lodestar should be adjusted. Therefore, the court will award Hobson \$54,387.50 in attorney's fees.

IT IS THEREFORE ORDERED that plaintiffs' motion for attorney's fees be, and the same hereby is, GRANTED in the amount of \$54,387.50.

DATED: June 19, 2007



WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE